# REVIEW ARTICLE

## Bringing Cinderella to the Ball: Teaching Criminal Law in Context

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*Alan Norrie*, **Crime, Reason and History: A Critical Introduction to Criminal Law**, London: Weidenfeld & Nicolson, 1993, xx + 279 pp, pb £16.95.

## I

Criminal law, we have been told, is the 'Cinderella subject' of the legal academy,[1] always left at home to sweep the fireplace while the ugly sisters, contract and tort, dress themselves up in fancy theories and go to the ball. Criminal law is isolated and unappreciated, its charms hidden behind a drab black-letter appearance. Its true character, by implication, is something else, requiring the touch of a fairy godmother to transform the law so that, in a fairy tale ending, it may take up its rightful place in the heart of legal study.

What is so special about criminal law? What are these hidden charms? In part, so the argument goes, the criminal law has been unfairly regarded as overly practical and theoretically uninteresting. It is a species of moral and political philosophy, or at least it is a proper subject for philosophical study, and therefore fitting material for students cutting their conceptual teeth. But more than this, it is claimed to offer an unparalleled prospect for interdisciplinary study, richer and more varied than any other element of the legal curriculum. The promise of the criminal law is seen in the fact that, while it may be technical, concerned with complex institutional arrangements, related to other branches of the law, and reliant on a complex body of procedural and evidential rules, it can at the same time be dressed up in sophisticated issues of normative theory.[2] The rags and pumpkins of doctrine and practice can thus, with a wave of the magic wand, take on the lines of an elegant ball gown or the delicate structure of a glass coach as the different elements of the subject are woven together. But, the lament goes, while this may be every academic's dream, it is all too rarely attempted. The teaching of criminal law for the most part remains locked into an obsession with appellate decisions, as teachers of criminal law (would-be Prince Charmings) construct doctrinal theories as fine and elegant as a glass slipper and then try to shoehorn the lumpy, misshapen foot of the law inside. The course continues to be dominated by the study of general theories of liability and, though the importance of 'context' is now acknowledged, it continues to have a rather shadowy presence. It is this question — how the criminal law should be taught (and Cinderella be brought to the ball) — that is the subject of this essay. I shall argue that the divide between law and context is

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1 Tur, 'Criminal Law and Legal Theory' in Twining (ed), *Legal Theory and the Common Law* (Oxford: Basil Blackwell, 1986) p 195.
2 *ibid* pp 195–199.


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unhelpful and artificial, and actually perpetuates the marginalisation of context and, thus, we should abandon certain of our attempts to teach law in context.

Spellbinding as the story undoubtedly is, then, it is not wholly convincing. It need hardly be pointed out that the problems that face the teacher of criminal law who would seek to teach in a contextual manner are identical to those facing the teacher of any other subject — even if it is also clear that the teaching of criminal law can pose its own problems. That criminal lawyers have expressed a concern about the theoretical neglect of their subject tells us more about our own anxieties and insecurities than it does about the law. Equally, there is surely little to be gained, and much to be lost, from the suggestion that any single body of law alone offers a unique insight into the understanding of the whole. Indeed, our understanding of the modern law has been severely retarded by the insistence that we read it through the forms or categories of private law.[3] But the primary concern must surely be that of how these extra elements of context and theory are to be integrated into the course.

There are clearly signs of a desire to meet the challenge identified by Tur, manifested in an increasing willingness to turn away from the criminal law's focus on 'black letter' law. However, underlying this it is possible to detect neither confidence in the path being following nor wholehearted enthusiasm for interdisciplinary study. Instead there is a rare sense of uncertainty and insecurity. Once upon a time, the content of the criminal law course was not something that required discussion. Criminal science was understood to be composed of the three branches of criminal law, criminology and criminal procedure, and the subject matter of the criminal law course was unquestionably case law and doctrine — criminal science served the science of law. But the consensus that held this criminal science together has shattered. The old triumvirate of criminal science has been replaced by a variety of different social scientific approaches, none of which has a recognised claim to primacy. Fragmentation has occurred within and between the different disciplines as a series of new borders have emerged. We cannot agree on what crime is, are unwilling to commit ourselves to the values the law should enforce, and feel distinctly queasy at the thought of judgment or punishment. Yet what is perhaps most striking, and unremarked upon, about the current situation is that a new orthodoxy — of pluralism and relativism — seems to be emerging. The technocratic focus on solving the problem of crime and on black letter law has been replaced by an academic heterodoxy.[4] Few, if any, teachers would nowadays deny the importance of context, even if differences remain over the type of context that is regarded as relevant. Uncertainty is assuaged by the inclusion of more — and more diverse — material in the course. We seek unity by multiplying the topics and approaches under study.[5] As well as teaching doctrine, we now seek to include a smattering of philosophy, sociology, psychology, history and politics, together with a range of different approaches to reading and interpreting law — producing a kind of 'critical overload' for both course and

3 See eg Simmonds, *The Decline of Juridical Reason* (Manchester: Manchester UP, 1984), for this argument, though his strong claim that we have misunderstood the nature of the modern law does not support his conclusion that we can only begin to understand by means of a return to the forms of private law.

4 An indicator of how the situation has changed since Lacey, 'The Territory of the Criminal Law' (1985) 5 OJLS 453–462, is that there are now a number of 'contextual' textbooks to choose from.

5 See eg Lacey, Wells and Meure, *Reconstructing Criminal Law: Text and Materials* (London: Weidenfeld and Nicolson, 1990); Alldridge, 'What's Wrong With the Traditional Criminal Law Course?' (1990) 10 *Legal Studies* 38–62.

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students. And, if it is difficult to make sense of the whole, criminal law teachers can at least comfort themselves with the thought that they are challenging the values that their students have brought to the course.

This need not be a bad thing, of course. The old orthodoxy was narrow — unjust and harsh practices were frequently committed in its name. If we cannot replace the easy confidence that we are in possession of the right answers to the problem of crime, then perhaps it is better to be open about our doubts, to express uncertainty, and to distance ourselves equally from the wrongs of crime and the wrongs committed in the name of the criminal law. But it strikes me that this is a defensive position, as well as being rather lazy. To be sure, both student and teacher can benefit from the variety of approaches now on offer, but this does raise the central problem of what context is and how it is to be integrated into the study of doctrine. If, as seems to be accepted, there is an irreducible core of doctrine that must be taught in every course, then the question is that of how it is to be taught. We should not be asking what is wrong with the traditional course[6] without also questioning the form that the new course should take.

## II

One potential answer to this question is that presented in the recently published *Crime, Reason and History* by Alan Norrie. This is without question an important book. Over the past decade, Norrie has established his reputation as one of the leading critical scholars in this area. He has shown a consistent willingness to engage with the more conventional positions of the criminal law, and has developed a singular and distinctive body of work — an achievement that is even more notable given that, as Norrie points out, 'Critical Legal Studies has had suprisingly little to say about criminal law' (p xiii).[7] The book, then, draws together and restates his position. It may also be read as offering a blueprint for the 'new' criminal law course. It is written as a textbook — 'a critical introduction to criminal law' — and represents the first attempt at an extended and contextual critique of such doctrine.[8] There is a clear attempt to integrate a treatment of the political and social issues raised by the enforcement of the law into the neutral and abstract accounts provided by doctrine. There are already signs that the book has been a success with students and teachers for its analytical rigour and willingness to tackle head-on the conventional accounts of the general part. This is its main strength, but it is also its main weakness. The reason for its success with law students — in that it provides an accessible critique of the main textbooks — may point very precisely to its limits as a critical enterprise. For all that this is an attempt to broaden the context within which the criminal law is taught, it is arguable that the critical focus of the book is overly narrow, both in terms of what

6 See Alldridge, *op cit.*

7 The almost complete absence of critical studies of criminal law from the US is worthy of comment, particularly given Kelman's highly praised 1981 article, 'Interpretive Construction in the Substantive Criminal Law' (1981) 33 Stanford L Rev 591. Is this due to an academic failure of nerve or merely a product of the organisation of CLS in the US? See Goodrich, 'Sleeping With the Enemy: Critical Legal Studies in America' (1994) 68 New York Univ L Rev 389–425.

8 This is not to ignore Lacey *et al*, above, n 5. This book had rather different aims. Indeed, the fact that Norrie regards his own work as complementing this book is to raise precisely the problems which I shall be discussing below.

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is looked at and the way that it is looked at. The question, then, that the book poses is whether we have not in fact already arrived at the limits of this approach.

Norrie focuses on the fact that the Anglo-American tradition in criminal law has been dominated over the past 150 years by the search for the elusive general theory of law founded upon the idea of individual moral responsibility. The important difference, however, is that where the tradition tries to build in principles of consistency and generality he is concerned with their absence and its consequences. Thus, although there are important similarities with his first book on the philosophy of punishment, there is also an important shift towards the study of the philosophical concerns which have driven criminal lawyers.[9] This is introduced, in the style of Lon Fuller, by a fable which seeks to illustrate the modern development of the criminal law through the story of the unsuccessful attempts of the King of Fictionopolis — a truly enlightened despot — to control his unruly subjects and solve the problem of crime. This establishes the main themes of the book, which are familiar from Norrie's earlier work: that the abstract form of the law masks and perpetuates social inequalities; that the judges are able to manipulate the formal categories of the law in particular instances; and that the system does not, and indeed cannot, work. It also sets the tone of the work, since the schematic history of the fable informs the reading of the development of the law, in particular as this is developed in the first two chapters. The bulk of the book is then devoted to the critical discussion and analysis of the general part of the criminal law, with sections on *mens rea*, *actus reus* and defences. It concludes, innovatively, with a chapter on sentencing in which it is argued that tensions in the rationality of the law are resolved by their displacement to the discretionary stage of sentencing. However, although it is comprehensive in its scope, the problem from a pedagogical point of view may be briefly stated: in trying to undermine the law curriculum in its current form, it relies heavily on that form and ultimately reproduces it.

This point is perhaps best made through a particular example. If we take a chapter of the book at random, say that on recklessness, we can raise both individual criticisms and the more general issue of critical and pedagogical method. This mode of analysis suggests itself, moreover, since the general analysis is repeated in its application to each particular topic.[10] We can begin, then, with the discussion of recklessness, a central area of contention in the modern law. The argument of the chapter is set out in the following terms:

> that the subjectivist/objectivist split in the law of recklessness is the historical product of the demoralisation and decontextualisation of fault that occurred through the Enlightenment reform project (p 60).

It thus makes reference to the form of the modern law as well as to the specific historical context — the Enlightenment reform project — that is said to be its origin. The discussion begins with a detailed analysis of the decision in *Caldwell*[11] and criticisms of that decision. This is the best part of the chapter, offering a fine illustration of Norrie's analytical skill in unpicking the contradictions of doctrine and holding them out to the reader. We go through the inadequacies of the standard

9 *Law Ideology and Punishment: Retrieval and Critique of the Liberal Ideal of Criminal Justice* (Dordrecht: Kluwer, 1991). This point seems to have been overlooked in the introduction to Shute, Gardner and Horder, *Action and Value in the Criminal Law* (Oxford: Oxford University Press, 1993).

10 'Just as we have examined the contradictions and tensions within the law of intention, so we now repeat the task in relation to the other main form of *mens rea*, recklessness' (p 59).

11 [1981] All ER 961; [1982] AC 341.

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objectivist position as exemplified by *Caldwell*, possible revisions of that position and their faults (notably Duff's attempt to ground the test of recklessness in 'practical indifference'), and an analysis of what is excluded by the subjectivist position. The argument is that although the law strains to avoid the appearance that it is making moral or political judgments by couching its decisions in neutral and abstract juridical language, it cannot avoid doing so. The political always creeps back in to give an unlimited amount of discretion to judge, prosecutor or jury in making decisions about the obviousness and social acceptability of risks. And in any case, he concludes, such decisions are always taken on the basis of the flawed assumption that a social and political consensus about harm and risk is possible — something that runs counter to the existence of deep and fundamental divisions in our society. In this sense, the law is an ideological practice — a 'praxiology,' to use one of the ugliest terms in social science — that operates to disguise those divisions. The focus of critical enquiry must, therefore, be the conditions under which certain practices, from legal decision-making to risk-taking, are perceived as justifiable or legitimate.

What is most immediately striking about this is that we are shown the mirror image of the orthodox account. Where the law is allowed no internal theoretical unity, Norrie sees a unity in terms of its ideological purpose. Where one claims to be formal and abstract, the other sees moral and political decisions being made. In holding up the mirror to conventional legal reasoning, Norrie demands that it recognise its true self, and insists that the cracks of formalism cannot be papered over. Thus, in this instance, legal practice is deeply and irredeemably flawed because of its attempts to anchor the concept of recklessness, 'in the individual in abstraction from the broader social context in which he operates' (p 80). Oddly, however, given the apparent scepticism displayed towards 'juridical individualism,' he seems at the same time to want to remain within the terms of the conventional discourse. This occurs in two senses. There is a rigid adherence to the analytical form and language of the conventional textbook which, incidentally, reproduces the law's own distinction between law and context. There is also, however, an ambivalence about legal subjectivity that cannot wholly be explained away in terms of the contradictions in the legal form. Thus, in a discussion of the relative merits of the subjectivist and objectivist positions, for example, he concedes that the subjective approach 'provides a rule-defined empirical focus for the criminal law' (p 70).[12] This strikes me as a rather curious statement from one who is insisting on the socially constructed nature of criminal liability, in its apparent acceptance of the subjectivist claim that the assessment of a mental state is a determinate, empirical question. Later, it is argued that 'practical indifference' cannot succeed in the contemporary law as a test of recklessness because it 'brings politics back into the law by showing that recklessness is, in each case, a matter of individual and socio-political judgment' (p 80). Thus:

> [a] concept like recklessness, when *used properly*, can unite the individual and the social in a moral judgment of what risks are and are not permissible, and how people should or should not address themselves to them (p 82, my emphasis).

This suggests a certain ambivalence towards juridical individualism. His version of the political is clearly based on subjective (social) perceptions of value and this also fuels the argument. It is revealed where and how political and moral

12 Likewise, 'Deciding what went on in the accused's mind at the time of his act may not be easy, but in principle it has a determinate answer: the accused was or was not aware of the risk' (p 66).

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judgments structure supposedly pure legal judgments. But what then? Where reason fails, are we to fall back upon the legal individual in a new social guise? Or perhaps it is just the emotional pull of certain stories about injustice or inequality that is to offer a new certainty. For in the above statements, the social status of the legal subject seems to be simultaneously denied and affirmed. And though the revelations have a certain didactic force, there seems to be something missing at the heart of the analysis. Norrie criticises the law for wanting to have its formalist cake and eat it (eg pp 46, 52): it is perhaps the case that he wants to have his analytical critique of legal formalism and leave some scraps for later.

At most, this amounts to an argument for a moral community of subjects and may yet provide the basis for the reconstruction hinted at in the conclusion — although a nagging doubt remains about how these subjects are to escape the negative consequences of their juridical individualism. Perhaps more significant, though, is that I think that it throws doubt on the idea that we can develop a critical account of the law if we focus exclusively on the (admittedly partial) forms of criminal liability. The main reason for this is that we continually begin from and seem forever destined to return to the individual subject, even if by sleight of hand certain of the legal functions are displaced onto the level of the social. The focus on the form of juridical individualism does not seem to me to provide the means for understanding fully the socially constructed nature of criminal liability. Once again, it is instructive to examine the definition of recklessness. In the modern law this is based on risk, yet by analysing this only through the individualism of the general part we can get no sense of risk as a social phenomenon. Accordingly, I would argue that it is possible to begin from the concepts of risk and security in order to see how the individual is constituted as a risk-bearing subject in the law, and the way that the different social risks that are policed by the law are distributed between subjects and subject populations.[13]

Norrie criticises legal doctrine, as we have seen, for its blindness to the broader social context in which the individual is situated, arguing that there are social causes of behaviour that are not recognised by the law (or are only recognised intermittently) (see esp chs 3 and 8). However, if the focus is drawn away from the narrow issue of responsibility, it is possible to see that social environment is increasingly recognised by the law — though with politically undesirable consequences. In a recent paper, Feeley and Simon have argued that the emergent trend in criminal law is what they term 'actuarial justice.'[14] Attention is increasingly turned towards the social causes of crime, but this is only in order to facilitate the administration and policing of problem or criminal populations on the basis of the increased statistical likelihood that they will commit crimes. These populations do appear in Norrie's account, in terms of a discussion of ineffectiveness of deterrence given the social pressures on individuals to commit crimes (pp 200–202), but it would appear that a different logic is at work. This becomes more apparent if we focus on the rationality of the legal practice, for it would appear that the aim is not the capture and punishment of individuals or even their deterrence, but the containment of social risk. This actuarial justice, moreover, is not necessarily antithetical to the conventional model of criminal law.

13 For a programmatic statement of how such an analysis might proceed, see Ewald, 'Norms, Discipline and the Law' in Post (ed), *Law and the Order of Culture* (Berkeley: University of California Press, 1991) pp 138–161.

14 Feeley and Simon, 'Actuarial Justice: The Emerging New Criminal Law' in Nelken (ed), *The Futures of Criminology* (London: Sage, 1994). There is surely something paradoxical in the idea of unaccountable actuarial justice!

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Both are about the distribution and management of social risks — although this is done sometimes at an individual and sometimes at a social level. Thus, while it is true to argue that the liberal criminal law's account of itself is partial and blinds us to social practices (pp 231–233), this may be equally true of a critique that takes this as its starting place. This may be put another way. Norrie argues that the law oscillates between individual justice and social control, with the judge at the point of intersection, and thus points to the impossibility of individual justice. But this is to overstate the importance of individual justice. The analysis, in fact, suggests the conditions for the existence of individual justice where there is a different logic of social control at work.

This sort of approach can open up a fruitful historical reading of the development of the law. As we have already noted, Norrie attributes the roots of recklessness to a 'demoralisation and decontextualisation' of the law that occurred during the Enlightenment. However, where he reads the statements of the Victorian Criminal Law Commissioners as evidence of a 'move from a broad evaluative account of recklessness to a narrower awareness-based account' (p 78), I think that he fails to grasp an important shift in the law. Prior to the early nineteenth century, the concepts of recklessness and negligence (or their functional equivalents) were unknown to the law; thus, what occurred was less a shift in the legal perception of recklessness than the outright invention of a new form of liability. Criminal liability for homicide, for that is where the concept of recklessness developed, was based on the doctrines of malice aforethought or implied malice in homicide. These did not operate in a way that we would recognise, for rather than looking to the intention of the accused, they looked to the circumstances surrounding the killing to judge whether these indicated wickedness or a malignant spirit. The state of an individual's mind was not regarded as something that could be factually determined. The crucial shift in legal practice that was reflected in the statements of the Criminal Law Commissioners, then, was that of perceiving recklessness as a state of mind that could be evidenced by an examination of the factual circumstances surrounding the act.[15] The factual question of whether there had been recklessness — 'the wilful exposure of life to peril' — was preferred over the moral judgment of whether there had been a 'vicious want of social affection.'[16] Thus, there was a demoralisation of the legal test, but this was connected to the emergence of a new type of legal subjectivity where the state of mind of the individual was paramount. The new categories of recklessness and negligence, as well as the now taken for granted gradation of seriousness in terms of intent, emerged blinking into the legal daylight. This new subjectivity was, as Norrie points out, based on the awareness and acceptance of risk,[17] though it is open to question how certain the law was left as a result. What is certain, though, is something rather different — namely that the Commissioners believed that to found responsibility in the state of mind of the individual was more certain. However, while it may have taken the politics out of law, it was putting another form of value judgment — based on acceptable risk-taking — in its place.[18] It is not, therefore, simply a question of the choice between wider or

15 For a fuller version of this argument, see Farmer, *The Boundaries of the Criminal Law* (Cambridge: Cambridge University Press, forthcoming 1996) ch 5.

16 *4th Report of the Criminal Law Commissioners*, PP.1839.XIX.235, at p xxiv, and *7th Report*, PP.1843.XIX.1.

17 See eg Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978) ch 4.

18 This is something that Norrie recognises (p 81), although I think he rather understates its historical significance.

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more narrow tests, but of a subtle and important shift in the nature of responsibility — a shift in which form is intimately linked to content. The category of manslaughter expanded dramatically as criminal liability was extended to cover those situations of death as a result of reckless or negligent conduct that had formerly been outwith the scope of the law.

The problem with Norrie's analysis, I think, is that there is a concentration on an idealised version of the form and practice of the law, with the result that the 'Enlightenment reform project' becomes an analytical rather than a historical moment (see eg ch 2). Paradoxically, this throws the modernity of the law into question, for the movement to the modern is simultaneously affirmed and denied. The Enlightenment is theoretically important as a means of affirming the rationality of the law. Yet, in denying this rationality, we would deny also its modernity. The problem is surely that the analysis is not actually sufficiently historical, never attempting to specify the actual practice or rationality of the law. Norrie sees only one theory of criminal law, and thus the perceived pre-eminence of the subjective individual in the modern law is read back into the past, leading him to see the history of recklessness in the wholly inappropriate terms of the modern debate between subjective and objective tests. The 'Enlightenment project' (in the specific form of the Criminal Law Commissioners) is made into the villain of the peace, standing for all the modern values of certainty, amorality, abstraction, individualism and so on. It is implicit in the argument that none of these things existed before, such was the barbarous state of the pre-modern law. This is merely to accept the conventional (and exaggerated) account of the reformers of the criminal law.[19] It is hard to disagree with the claim that we should focus on practice (p 232), but I think that this end has been only partially achieved. The rationality of both the modern and pre-modern criminal law is something that surely must be examined and reconstructed.

This may seem to have taken us a long way from the original question of how the criminal law should be taught and it is necessary now, in returning to that argument, to summarise the points that have been made. The first conclusion that I want to draw is that to concentrate on the general part of the law ties us unnecessarily to a certain version of the curriculum and to a certain understanding of criminal law theory. It may be replied, of course, that the book is merely intended to be a critique of the general part and not the full course — and, indeed, this much is stated in the introduction (p xiv). However, there are two further objections to this. The first is simply a matter of practical constraint. It is possible to teach both the law and its context, but I think that this puts an unacceptable load (in terms of material) on the course and the students who must take the course, without any perceptible gains in theoretical coherence. Even though there is a sense in which the context need not be 'brought into' the law course because it is already there, to be drawn out as the real practice of the law is presented, this is in turn constrained by the need to present the existing legal categories and the analytical form of the argument. It all ends up slavishly following the existing criminal law curriculum. The other objection would be that this reproduces that rather strict division between legal form and content, between law and context, for it creates no space within which these distinctions may be analysed. These are precisely the sort of distinctions, rooted as they are in the practice of the criminal

19 For a detailed if rather uncritical account of the nineteenth-century law reform movement, see Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century* (Chichester: Barry Rose, 1992).

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law, that should be put into question. As the argument above suggested, we use the term criminal law as a label to cover an increasingly diverse range of things — criminal procedure, administrative offences, the common law and so on — yet we attempt to fit all of these within a very narrow explanatory framework.[20] More generally, my argument is that we should be trying to get away from the existing categories of the law in our teaching. This brings me to my second conclusion. We should take great care about putting too much stress on an idealised form of the law, whatever the resulting analytical clarity. As I have argued above, this blinds us to certain legal practices and their historical development, and it is these that should be the starting point. Finally, then, this is an argument for a radical reconstruction of the legal syllabus. It requires that we move away from the traditional idea of teaching the law in context. This has become an increasingly meaningless label, often used to mask sloppy and unimaginative thinking about the law and legal categories. While the law in context movement pursues the dream of bringing Cinderella to the ball, I am suggesting not only that we be sceptical about the existence of the ball, but that we abandon the fairy tale altogether. There can be no happy ending to this particular movement in legal thought, only the awareness of a difficult present where our task is that of trying to include the question of why we believe certain stories about the criminal law within the course itself. In the final part of the paper, then, I will outline the principles that should guide the construction of a possible criminal law syllabus.

## III

These concluding remarks will offer a necessarily schematic account of a criminal law course. I will do this by setting out four principles — one theoretical and three historical — that I believe should be followed. The only rule that I have sought to respect is that it should be possible to include all the existing elements of the syllabus while remaining consistent with the theoretical claim (there is, after all, no need to frighten the Law Society!). I should also add that this is neither intended to be a programmatic statement (many different versions are possible), nor a suggestion that existing work be discarded. It attempts to build, in a constructive manner, on the argument in the earlier sections of this essay.

The first principle is that we must take seriously the claim that the criminal law be studied as an historical practice.[21] This offers a focus for the course in terms of a critical method, rather than through the identification of a unifying purpose or function of the law. As White has pointed out, those features that are normally identified as the purposes of the law (deterrence, retribution, rehabilitation) are mutually incompatible and are, in any case, best understood in terms of the language of institutional purposes. They are merely 'a reduced catalogue of the effects that punishment has been seen to have in practice.'[22] These are important points, for they direct us away from the search for unity in the law and towards institutional practices and their effects on our understanding. This, however, is not to be done solely in terms of instrumentalities: the history of the criminal law

20 For a similar type of criticism, though arguing for a different approach, see Boyd White, 'Making Sense of What We Do: The Criminal Law as a System of Meaning' in *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press, 1985).

21 For a more detailed version of this argument, see Farmer, 'The Obsession with Definition: Critical Legal Theory and Criminal Law' (forthcoming 1995) *Social & Legal Studies*.

22 *op cit* n 20 p 214.

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differs from the history of the prison, policing, the courts and so on. The criminal law, it must be stressed:

> concerns those aspects of criminal material that can be articulated: it is a system of language that classifies and translates offences and calculates sentences; a family of statements that is also a threshold.[23]

This is to say that the criminal law must be studied as a system of meaning, something that establishes a certain set of mental associations between the crime and the punishment, and the individual and society. There are affinities or correspondences between certain institutional forms and practices, but these are not given or necessary. It is the relations and interpenetrations of the institutional forms with the meanings or rationalities that are produced by the law that must be traced or mapped. It requires, then, primarily that we map the evolution of the practices of criminal lawyers and the truths that these produce, together with intersections and affinities with the practices of other institutions, thus opening a path to understanding the origins and importance of the different institutional and theoretical purposes that are to be found within the law. The theory of criminal law re-emerges as the history of theories of the criminal law.

The second principle is historical and follows from these remarks: it is the requirement that we start from particular crimes rather than from a general theory of the law. One reason for this is that it is historically more accurate — the most cursory examination of early works on crime demonstrates that general conditions of liability are of only minor concern. It is, of course, important to understand the contemporary significance of such general theories, but we can get a better sense of this (and their limitations) if we do not treat them as the beginning of the law. They are a relatively late arrival and, as I shall argue, are in my case related to particular crimes. I would also argue that taking particular crimes rather than, say, categories of crime (crimes against the person, sexual offences, etc) also gives scope for seeing how such categories themselves are not immutable. It is instructive, for example, to trace the formation of the unstable modern category of sexual offences from a mixture of offences against nature, public order, property, violence and the regulation of children. The course would begin by marking the emergence of the law's, specifically modern, preoccupation with social order and criminal conduct from the offences against the order and stability of the state that dominated criminal law in the eighteenth century. The fact that crimes against property were regarded as serious largely because of the threat that they posed to political order is often overlooked. This perspective reveals the nature of public order as a form of internal security based on the control of deviant populations. The offence of riot, for example, diminished in seriousness as styles of policing intensified, and the concern with good order is ultimately reflected in the rise of the generic police offence of breach of the peace aimed at the control of various forms of disorderly conduct.

The third principle is that the study of particular crimes can illustrate the entry of more general concepts into the law. The principal example here is the case of homicide, which is unquestionably the foundation for the various rules that we persist in treating as the 'general part' of the criminal law. Thus, the emergence of the general part should be taught in relation to the emergence of the modern law of homicide, and the associated transformation in the understanding of culpability, in the course of the nineteenth century. Homicide is the only crime which

23 Deleuze, *Foucault* (Minneapolis: University of Minnesota Press, 1988) p 32.

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differentiates between mental states as a measure of seriousness[24] — after all, the result is always the same — just as defences only really make sense in their application to homicide. This gradation of mental states was then taken to be paradigmatic for the whole law, producing a theoretical categorisation of offences that not only promoted offences against the individual and the body of the individual to the first order of seriousness, but also required that other crimes distinguish between *actus reus* and *mens rea* in their definition — whether this was appropriate or not. The paradigmatic status of homicide, and hence the generality of the general part, may be challenged in this manner.

The fourth and final principle is that we should link the discussion of particular crimes to more general trends in policing, and the ordering and regulation of what is permissible. This can mean a number of things. There is, for example, the trend towards the control of interpersonal violence in our society, which can be traced back to the eighteenth century and has clearly shaped the increasingly fine gradations of the modern law of offences against the person. There must also be noted the entry of the private sphere into the modern law through the growth of regulatory offences and agencies, the imposition of legal duties for the conduct of certain activities, and the 'discovery' of certain phenomena such as violence against women and children in the home. And lest these be thought to be isolated phenomena unconnected to each other, or more general trends in policing or the imposition of liability, I reiterate the point made above in the discussion of recklessness. Knowledge of these phenomena and the manner in which they are policed show how certain social risks are managed and distributed between subjects and subject populations. We must accordingly go beyond considerations of policy, or instrumental or expressive reason, if we are to understand and teach the modern criminal law. The law must be understood and presented as a series of shifting rationalities which demands that we as teachers abandon and challenge, however temporarily, our own received understandings of the law. How, after all, can we go beyond existing theory if we do not understand it properly?

24 It has been pointed out to me that there are other offences such as criminal damage and certain offences under the Offences Against the Person Act where the gradation of seriousness is in terms of the mental state of the accused. I would argue that in these cases the definitions of the crimes were reconstructed in terms of the paradigm of homicide.


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